

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BAY ELECTRIC INC.

and

Case 1-CA-32620(E)
1-CA-32903(E)

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL NO.
567, AFL-CIO

Kathleen F. McCarthy, Esq., of Boston, Massachusetts,
for the General Counsel.

Peter R. Kraft and Lawrence C. Winger, Esqs.,
of Portland, Maine, for the Respondent.

**SUPPLEMENTAL DECISION
(Equal Access to Justice Act)**

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: The charge in Case 1-CA-32620 was filed on April 22, 1994, and a complaint thereon issued on July 28, 1994, setting an initial hearing date of February 15, 1995. The charge in Case 1-CA-32903 was filed on May 3, 1995 and the complaint thereon issued on July 21, 1995. These matters were consolidated and tried before me on March 28, 1996. On July 3, 1996, I issued a decision recommending dismissal of both cases. The General Counsel took exceptions to the Board, which, on February 27, 1997, affirmed my findings as modified and adopted the recommended order of dismissal. 323 NLRB No. 20 (1997).

Thereafter, the Respondent (Applicant herein) filed a timely Application for an Award of Fees and Expenses under the Equal Access to Justice Act (EAJA), Pub. L. 96-481, 94 Stat. 2325 and Section 102.143 of the Board's Rules and Regulations, which was referred to me by order of the Board on March 28, 1997. The General Counsel filed an Answer, to which there has been no reply from the Respondent.

FINDINGS AND CONCLUSIONS

A. Eligibility.

5 The Applicant alleges, and the General Counsel concedes, that it was the prevailing party in underlying unfair labor practice cases and that it meets the eligibility requirements set forth in Section 102.143(c).

B. Substantial Justification.

10 In Case 1-CA-31620 it was alleged that the Respondent violated Section 8(a)(3) of the Act by refusing to consider for hire Benjamin Nest and refusing to consider for hire or hire Sidney Smith.

15 In Case 1-CA-32903 it was alleged that the Respondent violated Section 8(a)(3) by refusing to hire Gene Ellis and violated Section 8(a)(1) by changing its hiring policy.

20 The General Counsel does not contest that he was not substantially justified in prosecuting the allegations concerning Ellis or the hiring policy. Nor does the General Counsel contest an award of fees and expenses associated with his filing exceptions to my decision in the underlying case.

25 The General Counsel, however, does contend that he was substantially justified in prosecuting the allegations involving Nest and Smith, arguing that dismissal of those allegations depended on resolving credibility issues in favor of the Respondent's witnesses. I disagree.

30 In brief, Nest and Smith filed unsolicited applications for employment with the Respondent on September 24, 1993, but were not hired then, or thereafter. In dismissing this allegation the Board said:

35 We adopt the judge's finding that the Respondent did not, as alleged, violate Sec. 8(a)(3) of the Act by refusing to consider for hire Ben Nest and by refusing to consider for hire or to hire Sidney Smith, during the 60-day period between September 24, 1993, and November 23, 1993, when their applications were active (as provided on the fact of the applications). There was no showing that the Respondent was hiring during those 60 days. Thus, the General Counsel failed to establish that there was any unlawful conduct at any time during that period. In light of the General Counsel's failure to establish a prima facie case, we find it unnecessary to pass on whether the charge was barred by Sec. 10(b).

45 A critical fact to the alleged discrimination against Nest and Smith was the existence of job openings during the active period of their applications. While the Respondent's President did testify there were no job openings during this period, his testimony was credited in the absence of any contrary evidence. The General Counsel offered no evidence that there were in fact job openings. The Board's decision that the General Counsel failed to make out a prima facie case necessarily means any credibility issues were assumed in favor of the General Counsel and there was found to be insufficient evidence of a violation. Although my decision
50 relied on additional factors, it is clear that Board found the lack of evidence that the Respondent was hiring to be dispositive. Given the Board's decision, I must reject the argument of Counsel

for the General Counsel that a prima facie case was made in the Nest and Smith matter. Therefore, I must conclude that the General Counsel was not substantially justified in prosecuting this case.

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C. Amount of Fees.

10 The Applicant contends that the hourly rates charged by counsel (\$165 to \$185 per hour) were customary rates within the meaning of Section 102.145. The Applicant "requests that the Board exercise its authority under the Equal Access to Justice Act to provide for a higher reimbursement rate. At a minimum, the Respondent should be reimbursed at the rate of \$125.00 per hour, not \$75.00 per hour."

15 Though having the power to do so, the Board has not raised the maximum compensation rate for attorneys' time under EAJA.. The rate stands at \$75 per hour. Pursuant to Sec. 102.146, the Applicant could file petition under Sec. 102.124 for an amendment of the Board's Rules to increase the maximum rate, but it has not done so. Accordingly, the award here for fees must be limited to \$75 per hour for attorneys. The General Counsel does not contest \$60 per hour for paralegal time. This seems reasonable and will be awarded.

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D. Attorneys' Time.

25 By any large the General Counsel does not contest the bills submitted by counsel and paid by the Applicant. However, citing *Debolt Transfer, Inc.*, 271 NLRB 299 (1984), the General Counsel contends that only those fees and expenses occurring after the a complaint issues are recoverable. Fees and expenses associated with the investigation of the charge cannot be part of an EAJA award. Thus the General Counsel argues that certain claimed fees and expenses submitted in the bills of April 28, June 20, September 5, 1995, and all the fees in the bills for 30 August 7 and November 20, 1995, relate to the investigation of Case 1-CA-32903 and "other collateral matters not encompassed in the litigation."

35 Although I have some reservations about the correctness of the judge's reasoning in *Debolt*, his holding was adopted by the Board without comment and is the applicable rule. In essence, the judge reasoned that since anyone can file a charge, which the General Counsel must investigate, the government ought not be liable for fees and expenses to defend those which are unfounded. However, only when the General Counsel proceeds to complaint can there be an EAJA award, and in such a case, the General Counsel can be said to have adopted the unmeritorious charge. Where the General Counsel refuses to issue a complaint on an 40 unmeritorious charge, EAJA does not come into play. I therefore question that the policy of EAJA would necessarily foreclose an award of fees associated with the investigation of the charges here. Nevertheless, to the extent such can be identified, they will be excluded under the authority of *Debolt*.

45 The General Counsel also seeks exclusion of portions of bills relating to collateral matters; e.g. bill of April 28, 1995, "re union letter requesting bargaining; draft letter re same." While this may not relate to the litigation here, it may. These bills tend to be cryptic and do not necessarily definitively reflect the legal work done. Since counsel would be liable for serious sanctions for submitting a false claim, I cannot lightly reject that which is submitted as a bill 50 occurring in connection with the litigation here.

Accordingly, I will accept the time billed by Counsel for the Respondent as stated in the application, less all but .5 hour for June 20, 1995, and all the charges of August 7, 1995, since they were incurred in connection with the investigation of 1-CA-32903 and all charges of November 20, 1995, since they were incurred in connection with a possible 8(b)(4) charge against the Union. Thus:

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| | Date of Bill | Hours | x \$75 | Expenses |
|----|--------------|----------|---------|----------|
| 10 | 9/2/94 | 1.5 | 112.50 | 7.98 |
| | 11/2/94 | .6 | 45.00 | 7.01 |
| | 3/14/95 | 2.1 | 157.50 | .75 |
| 15 | 4/28/95 | .5 | 37.50 | 2.00 |
| | 6/20/95 | .5 | 37.50 | |
| | 9/5/95 | .7 | 52.50 | 3.80 |
| 20 | 4/19/96 | 3.4 | 255.00 | 5.95 |
| | 5/28/96 | 55.9 | 4192.50 | 427.55 |
| 25 | | 2.8 x 60 | 168.00 | |
| | 6/11/96 | .7 | 52.50 | |
| | 7/1/96 | 14.0 | 1050.00 | 18.86 |
| 30 | 7/31/96 | .8 | 60.00 | |
| | 9/30/96 | 14.3 | 1072.50 | 15.25 |
| | 3/27/97 | 15.7 | 1177.50 | |
| 35 | Total | | 8470.50 | 489.15 |

40 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

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¹If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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ORDER

The General Counsel is to reimburse the applicant herein in the amount of \$8959.65 in legal fees and expenses incurred in connection with defending the subject cases.

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Dated at Washington, D.C.
August 4, 1997

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James L. Rose
Administrative Law Judge

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Grand Rapids, MI